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Supreme Court, U.S.
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No. 95-5207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

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BRIEF FOR THE PETITIONER

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56 pp

QUESTION PRESENTED

May a state, consistent with the Eighth and Fourteenth Amendments, allocate a level of proof as high as clear and convincing evidence on a defendant in determining his competency to stand trial?

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OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as *Byron Keith Cooper v. State of Oklahoma*, 889 P.2d 293 (Okla. Crim. App. 1995), and is reproduced in Appendix "A" of the Petition for Certiorari and in the Joint Appendix (hereinafter "App.") at 50-97. The order denying Petitioner's petition for rehearing is unpublished. App. 98-99.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1257 (a) (1988), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States. The petition for certiorari was filed July 13, 1995, and granted on October 5, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1 (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Okla. Stat. tit. 22, § 1175.4 (excerpt):

> The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of going forward with the evidence.

STATEMENT OF THE CASE

1. Pre-Trial Proceedings

Byron Keith Cooper was charged with Murder in the First Degree on December 4, 1989 for the September 4, 1989 stabbing death of Mr. Harold Sheppard during the commission of a burglary. Mr. Cooper became a suspect after using Mr. Sheppard's J.C. Penney card. A watch and two cameras belonging to Mr. Sheppard were found in the home where Mr. Cooper had been staying. At Mr. Sheppard's house, authorities found Cooper's fingerprints on a flashlight, a metal can, a watch case and a carton of cigarettes. Serious questions regarding Mr. Cooper's competency to stand trial arose thereafter and reappeared repeatedly throughout the trial court proceedings.

a. *The August, 1990, Incompetency Determination*

In early August, 1990, counsel sought and obtained a judicial order to evaluate Mr. Cooper's competency to stand trial, because of serious concerns about Cooper's mental competency. (Record 336-37, 344-45). Dr. Edith King, a clinical psychologist employed by the Oklahoma Department of Mental Health, examined Cooper shortly thereafter and determined he was incompetent to stand trial. Among other things, she found him to be inattentive, irrational, incoherent, delusional, unable to focus on her questions, and unable to communicate effectively. (Transcript of Competency Hearing of December 20, 1990 and January 18, 1991, [hereinafter "C.H.I"] 4-30). After the prosecution made no effort to contest this evaluation the court committed Cooper to Eastern State Hospital, a state mental health facility, to be treated.

b. *The Second Exploration into Competency*

Upon his return from the hospital, another hearing on Mr. Cooper's competency was held in December, 1990, and January, 1991. Dr. King testified to her earlier finding of incompetency and told the court that in her opinion,

Cooper displayed a thought disorder and possibly experienced auditory and/or visual hallucinations. (C.H.I 7). She concluded that during her evaluation Cooper's disorientation and confusion were not feigned. (C.H.I 19). At the time of her testimony, Dr. King observed Cooper seemed oriented and no longer had the wild, out-of-control look he had when she had examined him earlier. (C.H.I 27-28, 32).

To rebut Mr. Cooper's evidence of incompetency, the prosecution called Eastern State Hospital psychologist Jeanne Russell. Russell did not actually participate on the team that treated Mr. Cooper, but she had conducted a screening interview two and a half months after his admission and evaluated his progress at the hospital. (C.H.I 38-40, 48). In Russell's opinion, Cooper understood the nature of the charges, was able to consult with counsel, and was not a mentally ill person as defined by statute. Moreover, she opined he was malingering and competent to stand trial. (C.H.I 43-44, 51).

On the basis of this record, the court found Mr. Cooper competent to stand trial. (C.H.I 101). The court made no finding Cooper was malingering.

c. *The Third Exploration into Competency*

More than one year and three months later, at the close of a motion hearing, Cooper's lead counsel again raised the issue of incompetence. (App. 3-7). Counsel stated he was ready for trial, but was concerned about Cooper's bizarre behavior both in the courtroom and in the county jail and that two investigators from the Oklahoma County Public Defender's Office who had spent considerable time with Cooper believed he was "cracking up." Counsel recognized he was not a doctor, acknowledged that Cooper might be faking, and offered the prosecution the opportunity to pick any doctor to assess Mr. Cooper and indicated he would pay for it.

The trial judge responded that he was not inclined to revisit his finding of fifteen months earlier:

> We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done. (App. 6).

d. *The Fourth Exploration into Competency*

Trial on the merits was scheduled to begin on May 4, 1992. But on that day again, Cooper exhibited strange behavior that suggested he was not competent to stand trial. As his attorney described his appearance, "his hair's poked out and going in every direction and it's unkept and he looks like heck." (Transcript of Pre-Trial Motions and Competency Hearing May 4 and 5, 1992 [hereinafter "C.H.II"] 3-4). Counsel also learned that Cooper had adamantly refused to change from his jail attire to court clothes. Cooper later told the court that the court clothes burned him. *Id.*

With this development, defense requested further inquiry into Mr. Cooper's competency and informed the court that another evaluation was necessary. (C.H.II 32). Counsel based this request not only upon Cooper's unkempt appearance and recent bizarre behavior, but also upon his mental health history, his family history with schizophrenia, his abject developmental history, his adamant refusal to talk to counsel during the preceding two months, and the opinions of two public defender investigators that Mr. Cooper was a deeply disturbed individual. (C.H.II 26-28, 32-36). During this discussion, Mr. Cooper assumed the fetal position in court. (C.H.II 35).

Later that day a hearing commenced on Mr. Cooper's competency to stand trial. Over the next day and a half, the defense presented several witnesses, lay and expert, who described Mr. Cooper as wholly unable to cooperate with counsel, to participate meaningfully in the proceed-

ings, or even to care appropriately for himself. The defense first called Mr. Cooper to testify. (*See* C.H.II 39-85). He failed to respond to a majority of questions, despite considerable cajoling. (*See, e.g.,* C.H.II 47-49). The questions he did answer indicated that he was afraid of his own counsel. Mr. Cooper repeatedly stated his counsel was trying to kill him and cause him bodily harm. (C.H.II 42-43, 46, 57-61, 71). He accused his lawyer, the prosecutor, and two other persons of trying to choke him with a rope. (C.H.II 57-61). Moreover, his responses to a number of questions had no basis in reality.[1]

During this examination, defense counsel produced a drawing made by Mr. Cooper of "Noryb," a spirit with whom Mr. Cooper claimed to communicate. Counsel agreed to return the drawing if Cooper would let the judge speak with Noryb. During this protracted negotiation, Cooper lapsed into unintelligible speech. (C.H.II 50). He did tell the court Noryb had stopped a conspiratorial attempt to choke him. (C.H.II 59, 62-64). Finally, he became so paranoid and distraught during the questioning regarding Noryb that as defense counsel approached him, he backed up out of the witness chair and fell backwards over the railing, jackknifed between the witness box and the wall, striking his head against the marble wall. (C.H.II 69-70, 84; App. 37-38).[2]

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[1] Mr. Cooper insisted his mother had died a long time ago. (C.H.II 41-42, 52-53). That obviously was not true, as his mother testified during the penalty phase of the trial. (Transcript of Trial [hereinafter "Vol."] XIII 20-52). He believed the case against him had been dismissed and he should be going home; he did not know why he was still in jail. (C.H.II 51). The last time he remembered seeing his brother was thirty years ago; Petitioner at the time was only thirty years of age, although he stated his age to be thirty-seven and claimed he was born around 1978. (C.H.II 53-54). He was not sure, but he thought he had been in prison before for rape. (C.H.II 55). None of his prior convictions were for sexual offenses.

[2] Defense counsel, in his argument to the court, vividly described Mr. Cooper's actions: "We got him back up here in the witness

The defense then presented five county jail inmates' testimony to show that Cooper's behavior during the preceding weeks had been highly unusual. This testimony showed that Cooper cleaned his cell incessantly, moved objects in a highly compulsive fashion, and sprayed disinfectant repeatedly. (C.H.II 86-92). One testified he had seen Cooper stirring his toilet with his hands and talking to himself. (C.H.II 93-104). Another noted Cooper talked to himself in an unintelligible mumble, cleaned "about 10 times a day," and played in the toilet. On one occasion, he saw Cooper rub feces on his face and pour toilet water over his head. (C.H.II 105-15).[3]

During at least a part of the hearing on May 4, 1992 Cooper talked to himself or an imaginary person in an unusual manner. (App. 8; C.H.II 226). Randall Bush, an investigator with the Oklahoma County Police Defender's Office, testified Cooper had been wholly unable to cooperate with efforts to prepare his defense:

> It's been my job to go up and talk to him, try to find out as much about the case as possible so I can help him. I go up to talk to Byron on numerous

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enclave, he's just busted his head, tears are streaming down his eyes and he does not respond in any normal fashion. He starts talking that Noryb is going to be mad at him and that wasn't faking. And I don't think anybody in the courtroom, Marlon Brando in his finest hour could not have faked that under that kind of pain and that kind of trauma, it cannot be done. And he was not responsive to the situation. He should have been mad at me, he should have been mad at you, he should have been mad at the deputies. Instead, he's afraid because he has this fear that Noryb's going to be angry with him." (App. 38).

[3] Another inmate testified to the same behavior, noting that "everybody thinks he's crazy." (C.H.II 123-128). Another inmate who had known Cooper since childhood made several attempts to talk to him. He determined Cooper was "just not the same individual that I've known back through childhood." He saw Cooper clean his cell about 12 times in a three-hour period, mumble to himself, tear up playing cards, and walk in circles around a trash can. (C.H.II 128-136).

> occasions and I get nothing. His pants are on fire, our office is trying to kill him, nothing to help me with his case, nothing that I can use. Nothing.

(C.H.II 140). Bush believed Cooper to be incompetent, and recounted a recent occasion when he took Cooper's brother to visit him. During the visit Cooper gave no indication of recognizing his brother. (C.H.II 137-48).

Dr. Philip Murphy, a licensed clinical psychologist, also testified. (App. 8-26; C.H.II 188-243). He had examined Cooper the evening of the first day of this competency hearing, after observing him that day in court. (App. 10, 12, 15). Prior to the examination, Dr. Murphy had reviewed Cooper's records from Eastern State Hospital and mental health records of his mother. (App. 10-11, 15).

Dr. Murphy reported that these records revealed that when Cooper initially arrived at Eastern State Hospital, two physicians "found him to be severely ill, looking very schizophrenic, thought disorder, very psychotic." (App. 10). During this period, Cooper was initially medicated with Haldol, an antipsychotic drug, and thereafter was placed on antidepressants. (App. 10). While taking the antidepressants, a blood test performed during the hospitalization indicated a low level of a particular metabolite. Dr. Murphy explained this meant Cooper clearly required antidepressants and was "overutilizing" the medication he was receiving. (App. 11). Upon intake, Dr. Murphy reported Cooper was given a rating of 15 as his focal level of functioning, "an extremely low number saying the person's barely functioning at all. . . ." (App. 11). Dr. Murphy recognized some of Cooper's symptoms were put on, but had no doubt that the bizarre behavior and his expressions were not due to malingering. (App. 21-22, 23).[4]

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[4] Dr. Murphy pointed out when the hospital was ready to discharge Petitioner, he told his doctors that he was ready to go back to court: "that part doesn't hold true with just a simple understanding of him [as] a malingerer." (App. 20-21). When the

Dr. Murphy determined that Cooper suffered from a major affective disorder having episodic form, meaning it would wax and wane on its own, particularly when left untreated, even with medication. Dr. Murphy thought Cooper might suffer as well from delayed post-traumatic stress disorder. (C.H.II 223). Thus, he concluded Cooper did not presently possess the ability to assist his counsel effectively. (App. 13, 14, 25, 26). As he explained during cross-examination:

> What I'm saying is that there's a confusion right now that makes it very difficult for anybody who's attempting to get good information back and forth from him and that's what the problem is. That type of confusion is probably linked to this affective disorder, therefore, if we can treat that underlying disorder, hopefully, he'll become less confused and a better person to work with when he works with his attorney.

(App. 21).

Dr. Murphy also discussed the phenomenon of "Noryb," which he felt Cooper truly believed, (App. 13), and found the fear Cooper had for his attorney was genuine and not feigned.

> [By Mr. Mildfelt] You believe he's honestly genuinely afraid of me?
>
> [By Dr. Murphy] Yes, I do believe he is honestly afraid of you.
>
> [By Mr. Mildfelt] You don't think that's any part of any malingering whatsoever?
>
> [By Dr. Murphy] No, that is not malingering.

(App. 13).

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prosecutor suggested the whole of Petitioner's exhibited symptoms could be "because he's really good at malingering," Dr. Murphy totally rejected this notion as impossible. (App. 22). "We're not dealing with an either/or. We're dealing with two things coinciding at the same time." (App. 23).

Dr. Murphy added that the stress of going to court aggravated Cooper's condition and probably added to his "decompensation." He suggested giving Cooper limited doses of anti-anxiety medication prior to court proceedings to reduce the decompensating effect. (App. 14). Dr. Murphy concluded that Cooper was presently incompetent and unable to effectively communicate with counsel. (App. 13, 14, 25, 26). He further opined that Cooper probably could achieve competency, within one month to six weeks if treated aggressively. (App. 26).

The State presented no medical evidence to challenge Dr. Murphy's conclusions. The prosecutor called three jail detention officers, who testified that in the few limited opportunities they had to observe Cooper, they did not see any unusual behavior. (C.H.II 148-65; App. 26-37). Testimony was also presented regarding two federal civil rights lawsuits filed by Cooper several months earlier while acting pro se. (C.H.II 167-81). This information did not affect Dr. Murphy's assessment of his mental status. (App. 24).

At the conclusion of the evidence, the trial court rendered findings as to Mr. Cooper's competence to stand trial. He agreed with defense counsel that Cooper was not normal,[5] found Dr. Murphy to be credible, and accepted his diagnosis.[6] However, he concluded:

> But you know, all things considered, **I suppose it's possible for a client to be in such a predicament that he can't help his lawyers, he can't help his defense,**

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[5] "Well, I think I've used the expression, I know I've talked to Mr. Mildfelt and said in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper identification that we are to use within competence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else." App. 42.

[6] The judge found: "I respect Dr. Murphy and I don't dispute Dr. Murphy's diagnosis . . . From what he observed, he's probably accurate." App. 42-43.

> **and still not be incompetent.** I suppose that's a possibility, too.
>
> I think it's going to take smarter people than me to make a decision here. I'm going to say that **I don't believe he has carried the burden by clear and convincing evidence of his incompetency** and I'm going to say we're ready for trial.

(App. 43) (boldface added).

2. Trial Proceedings

The trial proceedings subsequently commenced. Throughout, Cooper had no interaction with his counsel. He physically pulled away from the counsel he feared, and sat near a corner of the courtroom. At various points of the trial, he would appear to go to sleep, he rested in a fetal position, talked loudly to himself, and otherwise paid little attention to the proceedings. Even after two weeks had elapsed, he had not spoken to either of his counsel. (App. 44-46, 47; Transcript of Trial [hereinafter "Vol."] II 144-50, VI 136, XII 89, XIII 145).

a. The Fifth Exploration of Competency

Toward the end of the State's presentation of evidence, one of the deputies accompanying Cooper in the courtroom notified the trial judge there was "a real heavy odor of feces in the area" and Cooper appeared to have feces in his hand. Both the bailiff and the deputy had seen him eating feces. The court ordered a recess so the deputies could investigate and remove the feces from Cooper's hand. After being told to get cleaned up, Cooper complied by washing his hands and changing his coveralls. He also vomited, apparently involuntarily. (App. 47-48).

Counsel again asked the court for a mistrial and to commit Cooper to a mental hospital, or at least to continue the trial until an independent expert could reevaluate his competency. Counsel renewed their objection to

the standard of proof used in determining competency as well. The trial court summarily denied these requests. (App. 47, 48-49; Vol. VIII 136, 141-44).

The jury found Cooper guilty of murder. During the sentencing phase, evidence was introduced of the sustained abuse Cooper suffered virtually from birth at the hands of those under a duty to protect him: his family, foster homes, and the justice system.[7]

Briefly, the evidence showed Cooper and his siblings were in and out of institutions throughout their childhood. When they were with their mother, she regularly beat them with her hands, and items such as brooms, a hammer, extension cords, a candle holder, and shoes; she even pulled knives on them, and on one occasion shot at them. (Vols. XII 122; XIII 133). Of all the siblings, Mr. Cooper received the harshest beatings because, in his brother's opinion, he looked the most like their dad. (Vol. XII 95, 124). On one occasion his mother beat him with a baseball bat until he could not move. (Vol. XII 124-25). Cooper's uncle described seeing marks on his body from the beatings. (Vol. XIII 100). His sister recalled their mother "always told us that we ought to be dead, that she hated that we were born, and she ought to kill us." (Vol. XII 125).

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[7] Cooper's brother, older sister, uncle, grandmother, and great-aunt testified in great detail to Cooper's childhood, although, as Cooper's brother Ronald declared, they "didn't have very much of a childhood" because they didn't have a father and only "about a third of a mother." (Vol. XII 89-90). Their mother was an alcoholic and had been diagnosed with schizophrenia. (Vol. XII 122-23; C.H.II 32, 199). Their great-aunt observed that when the children were small, "[t]hey lived like animals." That is, they never had food or supervision and they begged for food. There were times when there was no water, electricity or gas in the house. (Vol. XII 136-40). Even when their mother was working in a nursing home, there were times when the family had no food in the refrigerator, only Boone's Farm Liquor. (Vol. XII 101).

When Cooper and his siblings were very small, they were placed in a foster home run by Lillian Spratt. Spratt often put the children outside in pens with her geese, which chased and bit the children; sometimes they were forced to sleep in the geese pens. (Vol. XII 91, 114-15, 121, 138, 144-45). Other times she locked the children in a small closet and left them there all night with a urine pot. (Vol. XII 91). The children subsisted on pork and beans and spaghetti from cans, although Spratt's own children were fed first, and the Cooper children got the scraps. (Vol. XII 91, 120, 137).

When Cooper was four years old, he and his siblings were removed from Spratt's home due to mistreatment and neglect and placed in the Corsicana State Home in Texas in late 1966. (Vol. XIII 120). There the children were told their parents had been killed in a car wreck, which was not true. (Vols. XII 120, 140, 147; XIII 111).

The Cooper children left Corsicana State Home in late 1969 or early 1970, when their mother was married to Lorenzo Williams. Lorenzo was a hard-working man and good stepfather to the children. In early 1974, when Cooper was only eleven years old, his mother shot and killed Lorenzo. (Vols. XII 93; XIII 17, 32). She was acquitted of second degree murder. (Vol. XII 94). Cooper had been close to Lorenzo and changed after his death. (Vol. XIII 8, 86). After Lorenzo's death, their mother literally forced her sons to support the family by stealing. (Vol. XII 124-25). In 1974, Cooper was sent to the Boley State School for Boys, where he stayed until 1978. (Vol. XII 16-17).[8] When Cooper was eighteen

[8] Years later, Boley would be featured in "Oklahoma Shame," a documentary that exposed the mistreatment of children and patients in various Oklahoma institutions during the years 1976-1980. (Vol. XIII 167-69). Some of the abuse occurring at Boley when Petitioner was there consisted of beatings by houseparents. (Vol. XIII 56-57). Larger, more aggressive boys known as "dukes" were allowed to run the dormitories. Dukes protected some boys in exchange for cokes, stereos, allowance money, and the like. Other boys became victims of sexual abuse. (Vol. XII 58-60).

years old, he went to prison where he was sexually abused. A former inmate testified this "really changed him a lot . . . Somebody take your manhood from you, you are lesser. You feel lesser." (Vol. XIII 73).

Dr. Wanda Draper, a developmental psychologist, testified that Byron Cooper, through no fault of his own, was unable to develop a sense of trust; self-confidence; self-worth; the ability to see the world around him and develop relationships; the ability to focus on and complete tasks; and the ability to reflect on his actions. (Vol. XIII 123-24, 132, 141). Of the hundreds of cases Dr. Draper had worked on in her twenty years of experience, she declared Cooper's developmental history to be one of the worst she had ever seen. (Vol. XIII 155-56, 171). After deliberations, the jury voted to impose a sentence of death.

On appeal, the Oklahoma Court of Criminal Appeals held the state law requirement that a defendant show incompetence by clear and convincing evidence did not violate the United States Constitution. The court ruled this "high" standard was appropriate because of the threat of malingering and noted "[a] truly incompetent criminal defendant . . . can prove incompetency with relative ease." (App. 61-62). The appeals court also held that the trial court did not abuse its discretion in determining that Mr. Cooper's evidence fell short of establishing incompetency clearly and convincingly. (App. 64).

SUMMARY OF ARGUMENT

The trial of a person more likely than not incompetent violates principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977). The right of a defendant to be tried only if competent is fundamental to our adversary system of justice. History teaches us that the trial of an incompetent has been condemned by civilized society for centuries. Competency to stand trial in England in the 1700s through the present has been judged by the civil standard of proof, a preponderance of evidence standard.

Early American cases and statutes fail to apply a clear and convincing standard of proof on competency determinations. Numerous later cases in the late 1800s and early 1900s enunciated a standard of preponderance of the evidence. This same standard applies in almost all states today and is the appropriate test in all Federal courts by statute.

Unlike the narrow class of cases where an individual's competence is in equipoise, Oklahoma's standard actually contemplates the trial of someone who is more likely than not incompetent. Such a policy has no historical pedigree and obviously fails to adequately protect the fundamental right not to be tried while incompetent. The determination that a defendant is competent to proceed implicates a host of constitutional principles that demand protection commensurate with their fundamental status.

Moreover, application of this standard not only underprotects the fundamental right to be free from trial while incompetent, it also denigrates the sound administration of justice by establishing dual standards for competency, one to stand trial and another for all other competency issues such as competency to enter a guilty plea or waive the assistance of counsel.

The trial of a person more probably than not incompetent is contrary to due process concerns of reliability in the fact-finding process and accuracy of verdicts. The higher the standard of proof applied, the more likely an erroneous finding of competency will be made. This is contrary to the protective purposes behind the clear and convincing standard, to ensure a heightened level of protection for life and liberty interests.

Finally, heightened reliability and accuracy interests in capital sentencing proceedings are undermined by the trial of one more likely than not incompetent. The demeanor of an incompetent person and his inability to provide counsel with vital mitigating evidence prevents a jury from making a reasoned, moral judgment as to his life.

I. THE TRIAL OF A PERSON FOR WHOM THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATES INCOMPETENCE OFFENDS PRINCIPLES OF JUSTICE SO ROOTED IN THE TRADITIONS AND CONCEPTS AND CONSCIENCE OF OUR PEOPLE AS TO BE RANKED FUNDAMENTAL.

Our Constitution bars trial when a citizen's mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, or to assist in preparing his defense. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Medina v. California*, —— U.S. ——, 112 S.Ct. 2572, 2579 (1992). This fundamental right is directly traceable from the genuine concerns for the mentally disabled expressed as early as the fourth century B.C. by Greek and Roman physicians and philosophers. Samuel J. Brakel, John Parry, & Barbara A. Weiner, *The Mentally Disabled and the Law* 9, 9-12 (3d ed. 1985).

These concerns were long ago embraced by English common law. As this Court noted recently:

> Blackstone acknowledged that a defendant "who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought,' " and "if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?' "

Medina v. California, supra, at 2577-78 (*quoting Drope v. Missouri,* 420 U.S. at 171 (*quoting* 4 W. Blackstone, Commentaries *24)); *accord,* 1 M. Hale, *Pleas of the Crown,* *34-*35 (1736).

A rule that allows the state to force a delusional or mentally unfit citizen to stand trial for his life unless he can demonstrate incompetence by clear and convincing evidence cannot be found at common law or throughout the development of the law of this country. Such a rule would have violated the substantive right of the defendant not to be tried while incompetent. This requirement of clear and convincing proof is not a procedural law focusing on the burden of producing evidence, but rather a substantial infringement on the fundamental right not to be tried while incompetent. In *Drope,* 420 U.S. at 172, discussing *Pate v. Robinson,* 383 U.S. 375 (1966), this Court held due process rights are violated where a state fails "to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Id.* at 172. The hearing to determine competency as discussed in *Drope, supra,* and *Pate,* 383 U.S. at 385, is meaningless if the standard of proof is so high that incompetent individuals will be tried. Oklahoma's procedure totally fails to "jealously guard" this fundamental right. *See Pate,* 383 U.S. at 385.

The fundamental right not to be tried while incompetent is violated by Oklahoma's decision to allow the trial of individuals who are more likely than not incompetent. This process fails to adequately protect the defendant's right not to be tried or convicted while incompetent, a

right implicit in any concept of ordered liberty. *Palko v. Connecticut,* 302 U.S. 319 (1937). This standard "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundmental." *Medina,* 112 S.Ct. at 2577; *Patterson,* 432 U.S. at 202.

A. No Standard of Proof Higher Than Preponderance Was Placed on a Defendant in a Competency Hearing at Common Law.

Unlike the issue of the proper allocation of the burden of proof in competency determinations, for which there was no settled tradition, *Medina,* 112 S.Ct. at 2578, no court at the time of the adoption of our Constitution used a clear and convincing standard in competency determinations. Rather, the common law demanded and applied a preponderance standard of proof. In *R. v. Podola,* 3 All E.R. 418, 429 (1959), a case recognizing that the onus of proof under Section 2 of the Criminal Lunatics Act of 1800 [9] was on the defense, Lord Parker, for the Court of Criminal Appeal, stated:

> In such a case, as in other criminal cases in which the onus of proof rests on the defense, the onus is discharged if the jury are satisfied on the **balance of probabilities** that the accused's insanity basis has been made out.

Id. (emphasis added).[10] The *Podola* court interpreted the instructions given in *R. v. Dyson,* cited in *R. v. Pritchard,*

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[9] The Act codified the treatment of insane persons charged with offenses. "And . . . if any person indicted for any offense shall be insane, and shall upon arraignment be found so to be by a jury lawfully impannelled for that purpose, so that such person cannot be tried upon such indictment, or . . . it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure shall be known. . . ."

[10] The words "insanity" and "lunacy" and the phrase "incompetency to stand trial" unfortunately have been interchanged for

7 C. & P. at 305n, 307 (1831), which charged the jurors "if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane," as a preponderance standard placed on the defendant.

Other early instructions included the jury instruction given in *Ley's Case*, 168 E.R. 1026 (1828) which is another example of the application of the preponderance standard. There, the defendant broke out into incoherent declamations when called upon to enter his plea. Suspecting mental disorder, the court empaneled a jury to try the question of his present sanity. The court instructed the jury that "[i]f there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial." 168 E.R. at 1026. In *Frith's Case*, 22 How. St. Tr. 307 (1790), in determining the level of proof of competency at the time of trial, the court instructed the jury they were to determine "whether he is at this time in a sane or insane state of mind?" *Id.* at 318. These early comments clearly demonstrate a preponderance test or a more likely than not standard.

In *R. v. Carr-Braint*, 2 All E.R. 156 (1943), a case dealing with the Prevention of Corruption Act of 1916, the Court of Criminal Appeal recognized that a rebuttable presumption and the words "unless the contrary is proved" should be construed

> in the same manner as similar words in other statutes, or similar presumptions at common law, for instance, the presumption of sanity in the case of accused person who is setting up the defense of insanity.

several centuries. *Podola* was a case involving competency to stand trial.

Id. at 158. The court agreed with the holding in *Sodeman v. R.*[11], that:

> [t]he burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged.

Id. See also 10 Halsbury, *The Laws of England* 437 (3d ed. 1955).

Incompetency to stand trial throughout English history was determined by the same level of proof as civil cases. It is clear that the civil standard was a preponderance of the evidence.[12] *Cooper v. Slade*, 10 Eng. Rep. 1488 (1858). Similarly, the Earl of Halsbury, in his comprehensive work, *The Laws of England*, stated that when the evidence as to the defendant's alleged incompetency is contradictory, "the proper inference to be drawn is that which arises from the general effect and tendency of the whole body of proof on each side of the question." 19 Halsbury, *The Laws of England* 410, para. 844 (1911) (citing cases from 1817 and 1831).

A study of American cases yields the same result. No state statute or state case well into the late twentieth century placed a clear and convincing standard of proof on a defendant to prove he was incompetent to stand trial.

[11] *Sodeman*, 2 All E.R. 1138 (1936) involved the question of sanity at the time of the act.

[12] "This civil standard was noted centuries ago. The authority in question was the judgment of Dyer, C.J., and a majority of the judges of the Common Pleas in *Newis v. Lark*, 2 Plowd. 408 (1571), decided in the reign of Queen Elizabeth. The report contains this passage: 'Where the matter is so far gone that the parties are at issue so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that what appears the *most probable*, and by the same reason that which is *most probable* shall be good evidence.'" *Cited in Carr-Braint*, at 158 (1943) (emphasis added).

Early American cases never demanded a clear and convincing requirement in competency determinations. In *State v. Arnold*, 12 Iowa 479 (1861), the Iowa Supreme Court explained the statutory provisions for proceeding on a claim of incompetency to stand trial, including the standard of proof: "If the verdict is in favor of his sanity, the trial proceeds, if otherwise, the proceedings are to be suspended until he becomes sane." *Id.* at 483. Most early cases refer to the English common law or the Criminal Lunatics Act of 1800 in discussing the origination of their state competency laws.[13] In *Crocker v. State*, 19 N.W. 435, 436 (1884), the Wisconsin court stated:

> Our statute . . . provides that when any person is indicted or informed against for any offense, if the court shall be informed in any manner that there is a probability that such accused person is, at the time of his trial, insane, and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof, . . . and if it shall be thereby determined that such accused person is so insane, his trial for such offense shall be postponed indefinitely . . . .

State cases at the turn of the century and into the early twentieth century likewise demonstrate the preponderance standard was the competency standard of proof. "In all cases, although the question may arise in a criminal case, the determination is controlled by the preponderance of the proof." *Jordan v. State*, 135 S.W. 327, 329 (Tenn. 1911). Two early Ohio jury instructions on the defendant's capacity to present facts on his behalf or assist his lawyer demonstrate the only standard at common law. In *Ohio v. Dominick O'Grady*, 5 Ohio Dec. 654, 655 (1896), the court simply stated, "The burden is upon the

[13] *Webber v. Commonwealth of Pennsylvania*, 13 A. 427 (1888), noted the Pennsylvania criminal code of 1860 was almost word-for-word identical to the Criminal Lunatics Act of 1800. *Id.* at 433. *See also People v. McElvaine*, 26 N.E. 929 (N.Y. 1891).

prisoner to show by a preponderance of proof that he is insane." Similarly, the court instructed the jury in *Ohio v. Dominic Tyler*, 7 Ohio N.P. 443 (1898): "I will repeat that—what I mean by the preponderance of the evidence is that the accused must show that he is now at the time of his trial probably not sane."

The Louisiana Supreme Court again stated the applicable law regarding present sanity issues: "At the outset of our inquiry, we are confronted with the presumption of law that every man is presumed to be sane until the contrary is proven by a preponderance of the evidence." *State v. Seminary*, 115 So. 370, 372 (La. 1927); *see also State v. Helm*, 61 S.W. 915 (Ark. 1901). The same preponderance standard was placed on defendants where the competency issue was raised after conviction and prior to sentencing. *See, e.g., People v. Lawson*, 174 P. 885 (Cal. 1918); *State v. Bethune*, 71 S.E. 29 (S.C. 1911); *People v. Geary*, 131 N.E. 65 (Ill. 1921). Nearly 90 years ago, in *United States v. Chisolm*, 149 F. 284 (S.D. Ala. 1906), the court instructed the jury that the defendant bore the burden "to generate a fair reasonable doubt" as to his competency to stand trial, a standard no higher than preponderance.

History thus reveals a salient truth. Almost never—and even then, not until only most recently—has so high a burden been placed on a defendant regarding competency. The settled tradition is to prohibit trial when it is more likely than not the defendant is incompetent.

Even today the overwhelming number of states that specify a burden on the defense utilize a preponderance standard. Indeed, the clear and convincing standard of proof in competency decisions is one of recent vintage.[14]

[14] Contemporary practice is of some significance in determining whether a practice violates due process. *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 528 (1992); *Medina*, 112 S.Ct. at 2578.

Such a weighty burden on a defendant to prove incompetence exists only in Oklahoma and three other states.[15]

Prior to this Court's opinion in *Addington v. Texas*, 441 U.S. 418 (1979), only Pennsylvania had adopted a clear and convincing burden for competency determination.[16] In what looks like a misplaced understanding of this Court's decision in *Addington*, Oklahoma and Connecticut changed their statutes shortly after *Addington* in 1980 or 1981.[17] Wisconsin also changed its statute to clear and convincing shortly after *Addington*[18] but has since rejected this standard for the defendant and only requires a clear and convincing proof if the State desires to commit the defendant, but a preponderance on the State if the defendant raises the issue.[19] Rhode Island only recently required clear and convincing proof in 1993.[20]

Fourteen jurisdictions place the burden of proof specifically on the prosecution.[21] Six states place the burden

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[15] Connecticut, Conn. Gen. Stat. § 54-56d (b) (1981); Oklahoma, Okla. Stat. tit. 22, § 1175.4 (Supp. 1980); Pennsylvania, 50 Pa. Cons. Stat. § 7403(a) (1976); and Rhode Island, R.I. Gen. Laws § 40.1-5.3-3 (1993).

[16] Pennsylvania selected this standard in 1976. 1976 Pa. Laws Act No. 143 § 402.

[17] There is no legislative history that has been located to confirm or deny this statement. 1980 Okla. Sess. Laws Ch. 336 § 4(B); 1981 Conn. Pub. Acts 81-365.

[18] Wis. Stat. § 971.14(4) (1980).

[19] Wis. Stat. § 971.14(4) (1990).

[20] 1993 R.I. Pub. Laws Ch. 5.3 § 40.1-5.3-3.

[21] Alabama, *Lackey v. State*, 615 So.2d 145 (Ala. Crim. App. 1992); Alaska, *McCarlo v. State*, 677 P.2d 1268 (Alaska Ct. App. 1984); Delaware, *Diaz v. State*, 508 A.2d 861 (Del. Super. Ct. 1986); Hawaii, Haw. Rev. Stat. § 704-404, § 704-411 (Supp. 1992); Illinoi, Ill. Rev. Stat. ch. 725, para. 5/104-11(c) (1993); Maryland, *Jolley v. State*, 384 A.2d 91 (Md. 1967); Massachusetts, *Commonwealth v. Crowley*, 471 N.E.2d 353 (Mass. 1984); Mississippi, *Griffin v. State*, 504 So.2d 186 (Miss. 1987); New Hampshire, *State*

on the "moving party" to prove either the competence or incompetence of the defendant by a preponderance of the evidence.[22] Eight states plus the District of Columbia place the burden on the defendant to prove by a preponderance of the evidence that he is incompetent to stand trial.[23] Additionally, three states specify a preponderance of the evidence standard, but do not allocate the burden of proof to the state or to the defendant.[24] Thus, in these thirty-one jurisdictions, the heaviest burden ever placed on the defendant to prove incompetency is that of preponderance.

In two states, decisional law does not allocate a burden to either party, but rather places the responsibility on the trial judge to determine whether he is "satisfied" that the

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v. Zorzy, 622 A.2d 1217 (N.H. 1993); New Jersey, *State v. Otero*, 570 A.2d 503 (N.J. Super. Ct. Law Div. 1989); New York, *People v. Santos*, 349 N.Y.S.2d 439 (2d Dept. 1973); North Dakota, *State v. Heger*, 326 N.W.2d 855 (N.D. 1982); South Dakota, *State v. Jones*, 406 N.W.2d 366 (S.D. 1987); Wisconsin, Wis. Stat. § 971.14 (Supp. 1994 & Supp. II 1995).

[22] California, Cal. Penal Code § 1369(f) (West 1982 & Supp. 1995); Colorado, Colo. Rev. Stat. § 16-8-111(2) (1986 & Supp. 1995); Utah, Utah Code Ann. § 77-15-5(10) (1995); Texas, *Blaylock v. Texas*, 820 S.W.2d 882 (Tex. Ct. App. 1991); Virginia, Va. Code Ann. § 19.2-169.1(E) (Michie 1995); and Wyoming, *Loomer v. Wyoming*, 768 P.2d 1042 (Wyo. 1989).

[23] Arkansas, *Deason v. State*, 562 S.W.2d 79 (Ark. 1978); *State v. Helm*, 61 S.W. 915 (Ark. 1901); District of Columbia, D.C. Code Ann. § 24-301 (1989 & Supp. 1995); Florida, *Flowers v. State*, 353 So.2d 1259 (Fla. App. 1978); Georgia, *Davenport v. State*, 317 S.E.2d 895 (Ga. Ct. App. 1984); Iowa, *State v. Rhode*, 503 N.W.2d 27 (Iowa Ct. App. 1993); Louisiana, *State v. Seminary*, 115 So. 370 (La. 1927); New Mexico, *State v. Chapman*, 721 P.2d 392 (N.M. Ct. App. 1986); Ohio, *State v. Tyler*, 7 Ohio N.P. 443 (1898); Tennessee, *Jordan v. State*, 135 S.W. 327 (Tenn. 1911).

[24] Minnesota, M.S.A. Rules Crim. Proc., Rule 20.01 (1995), West Virginia, W. Va. Code § 27-6A-2(b) (1992 & Supp. 1995), and Washington, Wash. Rev. Code § 10.77.090 (1994).

defendant is competent to stand trial.[25] Research of the remaining 13 states fails to indicate statutory language or case law requiring any sort of clear and convincing finding before one can be adjudicated incompetent.[26] Fundamental notions of due process dictate that high burdens in the law necessarily must be explicitly set forth so that the bearer of the burden may be prepared to meet his burden. This Court has established that

> since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be **calibrated in advance.**

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (emphasis added). Significantly, the federal statute also follows the common law and requires the defendant to prove his incompetence by a preponderance of evidence. 18 U.S.C. § 4241 (1994).

Thus, the only logical and most obvious inference from these practices is that forty-six states and the District of Columbia refuse to place a standard of proof as high and unreliable as clear and convincing to prove incompetency.

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[25] Indiana and Missouri. *See Missouri v. Clark*, 546 S.W.2d 455 (Mo. Ct. App. 1976) (the only burden which exists in an incompetency proceeding rests on the trial judge to satisfy himself that the accused is or is not competent to stand trial); *Wallace v. State*, 486 N.E.2d 445, 454 (Ind. 1985).

[26] Arizona, 17 A.R.S. Rules of Crim. Proc., Rule 11.2 (1987 & Supp. 1995); Idaho, Idaho Code § 18-212 (1972 & Supp. 1995); Kansas, Kan. Stat. Ann. § 22-3302 (1988 & Supp. 1994); Kentucky, Ky. Rev. Stat. Ann. § 504.100 (Michie 1990 & Supp. 1994); Maine, Me. Rev. Stat. Ann. tit. 15, § 101 (West 1964 & Supp. 1994); Michigan, Mich. Comp. Laws § 330.2020 (1970 & Supp. 1995); Montana, Mont. Code Ann. § 46-14-221 (1992 & Supp. 1995); Nebraska, Neb. Rev. Stat. § 29-1823 (1989); Nevada, Nev. Rev. Stat. § 178.415 (1992); North Carolina, N.C. Gen. Stat. § 15A-1002 (1994); Oregon, Or. Rev. Stat. § 161.370 (1993); South Carolina, S.C. Code Ann. § 44-23-410 (Law Co-op 1985 & Supp. 1994); and Vermont, Vt. Stat. Ann. tit. 13, § 4817 (1974 & Supp. 1995).

These contemporary practices support the common law view that a clear and convincing standard to prove incompetency violates the substantive due process right not to submit to trial while incompetent.

B. Fundamental Fairness Prohibits the Trial of an Individual Who Is More Likely Than Not Incompetent.

Mr. Cooper has just demonstrated that history forbids the trial of incompetent individuals and that one is incompetent if the evidence so preponderates. These views reflect the age-old understanding that to try a person who cannot comprehend the proceedings and defend himself is both unfair and unproductive to the ends of justice. *See Dusky v. United States*, 362 U.S. 402 (1960). It is no wonder that history refuses to endorse a standard of proof higher than preponderance. Such an inappropriately high standard would substantially increase the likelihood that constitutionally incompetent defendants would be convicted and in some instances condemned to death.

This Court, in approving allocation of the burden of proof on the defendant in *Medina*, noted:

> Under California law, the allocation of the burden of proof to the defendant will affect competency determinations only in a *narrow class of cases where the evidence is in equipoise*; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent.

Medina, 112 S.Ct. at 2579. Unlike the California scheme, which had only a marginal effect on the substantive right not to be tried while incompetent, Oklahoma's clear and convincing standard necessarily impacts upon a larger class of people, and guarantees that some who make a strong showing of incompetence and persuade the factfinder he is likely incompetent must nonetheless proceed to trial. At the time of Petitioner's trial, Oklahoma's

standard jury instruction defined the clear and convincing burden of proof followed as follows:

> When I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is true, and that this conclusion is unmistakable and free from serious or substantial doubt as to its correctness.

Oklahoma Uniform Jury Instructions-Civil 3.2.[27] The trial court's invocation of this stringent standard of proof inappropriately guaranteed that Cooper's strong argument of incompetency would fail because it could not be shown by clear and convincing evidence. App. 42-43.

This Court has repeatedly held that state laws controlling competency procedures must be "adequate" to provide meaningful and reliable safeguarding of an accused's right not to be subjected to criminal prosecution while incompetent. *Medina*, 112 S.Ct. at 2579; *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 378. Oklahoma's clear and convincing requirement is unconstitutional because it fails to provide anticipatory, protective procedures which sufficiently minimize the risk that an incompetent person will be subjected to criminal procedures and offends the recognized principles of fundamental fairness. It violates "powerful social standards of progressive society." *Medina*, 112 S.Ct. at 2582 (O'Connor, J., joined by Souter, J., concurring in judgment).

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[27] This instruction was changed by the recent enactment of new civil jury instructions. The instruction now reads "[w]hen I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is highly probable and free from serious doubt." OUJI-Civil 3.2 (1993).

1. This standard is fundamentally unfair in operation and burdens unwisely the administration of justice.

In *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517 (1992), this Court rejected a due process challenge to the Kentucky recidivism procedure, and concluded by saying:

> In sum, neither our precedents nor historical or contemporary practice compel the conclusion that Kentucky's burden-shifting rule violates due process, and we cannot say that the rule is fundamentally unfair in its operation.

Id. at 525. *See also Medina*, 112 S.Ct. at 2582 (O'Connor, J., joined by Souter, J., concurring in judgment) ("Against the historical status quo, I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation"); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 1817-20 (1992) (Kennedy, J., concurring in judgment).

In determining whether Oklahoma's standard offends due process considerations of fairness in its operation, it is useful to look at the effect this requirement has on the fundamental right not to be tried while incompetent, the reliability of the fact-finding process in determining competency, the ability of a defendant to meet this evidentiary burden in light of the legitimate state concerns about access to evidence and feigning incompetency, and the social cost to the fundamental right not to be tried while incompetent.

No compelling or adequate justification exists for abandoning the common law view that if one is more likely incompetent, he is incompetent. Initially, it is important to realize the State does not have to prove anything to prevail. On the other hand, for the defendant to prevail under a preponderance standard he must prove he is more likely than not incompetent. The defense must garner all available evidence of incompetency and provide the fact-finder with opinions of experts, prior opinions of doctors,

nurses, lay testimony, any other observations, hospital records, and any other relevant evidence.

A preponderance standard also adequately addresses the concerns that an inconclusive examination will unfairly benefit the defendant because such an examination will fall far short of satisfying the defendant's burden. The defendant will have a strong incentive to present all available evidence to the examiner as well as the factfinder, to avoid an inconclusive examination. *Cf. Medina v. California*, 112 S.Ct. at 2582 (O'Connor, J., concurring in judgment). The defendant, to prove incompetence, must persuasively show the factfinder that the greater weight of the evidence shows incompetency. Otherwise the evidence will be in equipoise (or less) and the defendant will not prevail.

In determining whether a clear and convincing standard violates considerations of fairness, it is important to realize like many psychological inquiries, competency evaluations are "in the present state of mental sciences . . . at best a hazardous guess however conscientious." *Solesbee v. Balkcom*, 339 U.S. at 23 (1950) (Frankfurter, J., dissenting); *see also Ake v. Oklahoma*, 470 U.S. 68, 80-81 (1985); *Addington*, 441 U.S. at 430; *Drope*, 420 U.S. at 176; Anthony Highmore, *A Treatise on the Law of Idiocy and Lunacy* 202 (1807) ("nothing is more difficult than to prove the fact of insanity"). The uncertainty of psychological inquiries strongly suggests a clear and convincing standard grossly underprotects the fundamental right to avoid trial while incompetent.

This Court noted in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958):

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder . . . .

In the instant case the trial judge did not dispute the expert's finding of incompetency but concluded that Cooper's overall evidence was not so strong to show his incompetence clearly and convincingly. App. 42-43.

The clear and convincing burden the incompetent must overcome creates an unacceptable risk that this core requirement of due process will be violated and an individual will be tried when he is unable to follow or participate in the proceedings to determine his fate. *Cf. Riggins*, 112 S.Ct. at 1810. Oklahoma has said by this standard that it is better for a person more likely than not incompetent to go to trial than it is for this person to be temporarily sent to a hospital for treatment before he goes to trial.[28]

This Court has long recognized the legitimate prosecution's concern that a defendant might feign incompetence in order to avoid trial. *Medina*, 112 S.Ct. at 2582 (O'Connor, J., concurring in judgment). Yet history has just as long believed that the preponderance standard offered sufficient protection.[29]

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[28] Of course the finding of incompetency is only temporary. In Petitioner's case, the expert concluded that in four to six weeks Petitioner could be restored to competency to the point where he could go to trial. App. 14, 26. Lord Hale recognized the temporary nature of incompetency: "In case a man in a phrenzy happen by some oversight to plead his indictment, and put himself on his trial; and it appeareth to the Court on his trial that he is mad, the judge in discretion may discharge the jury of him; *and remit him to gaol to be tried after the recovery of his understanding* . . . And common sense will at the same time tell us, that the bare postponing a trial under these circumstances, will not discharge the prisoner from a *future trial, when his present disability shall be removed.*" 1 Hale P.C. 35, quoted in *Kinloch's Case*, 18 How. St. Tr. 395, 411 (1746). *See also* M.H. 28; Brakel, *supra* at 701; Group for the Advancement of Psychiatry, 2 *Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial* 901 (Rep. No. 89, 1974).

[29] The concern is not of recent origin. It has been around for centuries. *See Trial of Charles Bateman*, 11 How. St. Tr. 467 (1685). Pretended madness would be discovered through the com-

Additionally, experts who conduct competency evaluations are well aware of malingering. Dr. Murphy was well aware of the concept of malingering, looked for it during his evaluation of Cooper, and concluded Mr. Cooper was feigning his condition somewhat. App. 12, 17-18. However, Dr. Murphy was firmly of the view that despite incidental malingering, Cooper was nevertheless incompetent to stand trial. Malingering and incompetency to stand trial can be co-existent. App. 16, 18, 21, 23, 25.[30]

Each of the three testifying experts who evaluated Mr. Cooper looked for malingering behavior. Whenever litigation of any sort is involved, "the psychiatrist needs to shift his attitude from not only believing everything the patient says, but to suspecting malingering as well." Ziskin, *Malingering of Psychological Disorders*, 2 Beh. Sci. L. 39, 40 (1984).[31] In fact, exaggeration of symptoms tempts the expert to over-identify competence.[32]

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petency hearing or "inquest". *Id.*; John Brydall, *Non Compos Mentis* 113 (1700).

[30] Arthur T. Meyerson, M.D., *Malingering*, in 2 *Comprehensive Textbook of Psychiatry/V* 1396, 1397 (Harold I. Kaplan, M.D. & Benjamin J. Sadock, M.D. eds., 1989). *See also United States v. Chisolm*, 149 F. 284 (S.D. Ala. 1906); Hay, *Feigned Psychosis—A Review of Simulation of Mental Illness*, 143 Brit. J. Psychiatry 8, 10 (1983) (a study of patients initially diagnosed as feigning psychosis who were later diagnosed as schizophrenic; elevation of one scale on MMPI test may identify malingering but also identifies psychosis and behavioral disorders).

[31] *See also* Resnick, *The Detection of Malingered Mental Illness*, 2 Beh. Sci. L. 21, 28 (1984) (above all, malingering must be suspected in criminal defendants); Resnick, *Malingered Psychosis*, in *Clinical Assessment of Malingering and Deception*, 48-52 (Rogers ed., 1988).

[32] Drob, Berger and Weinstein, *Competency to Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull. Am. Acad. Psychiatry and Law 85, 92 (1987); *see also* Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 735-36 (1974) (mental health professionals almost always resolve doubtful questions to patient's

The jury instruction given in *United States v. Chisolm*, 149 F. 284 (1906), a present competency case, eloquently discusses feigned mental weaknesses and the possible consequences to society:

> It is proper that I should say to you that the defense of insanity, . . . is frequently resorted to without any just basis. . . . It would be a reproach to justice if a guilty man escaped the penalty for a crime upon a feigned mental irresponsibility, or **postponed his trial** upon a feigned condition of mind, as to his inability to aid in his defense. On the other hand, . . . **it would be likewise a reproach to justice and our institutions, if a human being** 'made in God's own image,' while suffering as the old books put it 'under a visitation of God,' **were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former;** since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice **would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.**

Id. at 288-89 (boldface added).[33]

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disadvantage); Resnick, *Malingered Psychosis*, in *Clinical Assessment of Malingering and Deception* 49 (Rogers ed., 1988) (when condition shows mixture of schizophrenic and antisocial features, mental health professionals may focus only on antisocial traits); Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull. Am. Acad. Psychiatry L. 187, 197-98 (1987) (one screening instrument consistently favors finding of competency).

[33] "[T]he possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the court to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice." *Davis v. United*

The skepticism that is generally leveled toward a criminal defendant's claim of mental illness, the awareness in the psychiatric and legal communities of the potential for false claims, and the tendency of experts to over-identify competency where some degree of feigning is present offer sufficient protection against abuse of the competency procedure.[34]

Moreover, application of the clear and convincing standard not only underprotects the fundamental right to be free from trial while incompetent, it also ill serves the sound administration of justice because it will require redundant post-trial inquiry into a defendant's competency in numerous circumstances.

Recently, the Court made it clear that the competency to stand trial standard announced in *Dusky*, 362 U.S. 402, governs all other competency issues such as competency to enter a guilty plea, or to waive the assistance of counsel. *Godinez v. Moran*, —— U.S. ——, 113 S.Ct. 2680 (1993). In doing so, the court disapproved of a lower court precedent that required a different and "heightened" competency standard for abandonment of counsel situations:

> Nor do we think a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

States, 160 U.S. 469, 492-93 (1895) (insanity at the time of the act).

[34] Additionally, ethical standards place limits on when lawyers can raise an issue of incompetence: "In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation, or to delay the proceedings against the defendant." ABA Criminal Justice Mental Health Standards, Standard 7-4.2(e) (1989).

Id. at 2686.

A defendant who is competent to stand trial under this standard is also competent to waive counsel and to enter a guilty plea. *Id.* Strict adherence to a dual competency standard would have resulted in the court not being able to proceed even though it had found the defendant competent to stand trial. The same dual standard is created where a defendant who is more probably than not incompetent is found competent because a state employs a clear and convincing standard.

Permitting a state to replace the preponderance standard for competency determinations with a more demanding showing will surely generate the very same type of complications disapproved in *Godinez*, particularly in cases where the evidence shows it is more likely than not that the defendant is incompetent. For example, any such defendant who later demonstrates by a preponderance of the evidence that he was not competent to knowingly, voluntarily and intelligently waive his right to trial or counsel is entitled to relief from judgment.[35] Thus, a state court determination of competency, adjudged under the clear and convincing standard, would not be entitled to a presumption of correctness and would have to be disregarded because it is based upon a standard more demanding than the federal one.

[35] For a waiver to be valid under the due process clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Moore v. Michigan*, 355 U.S. 155 (1957), this Court determined "that when a judgment of conviction entered in a federal court is collaterally attacked upon the ground that the defendant did not have the benefit of counsel, he has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel." *Id.* at 161.

2. *An erroneous finding of competency imposes an unacceptable social cost on the fundamental right not to be tried while incompetent.*

As Justice Harlan, in his concurring opinion in *In Re Winship*, 397 U.S. 358, 370 (1970) eloquently wrote:

> . . . in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. . . . [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

Id.[36]

In *United States v. Fatico*, 438 F.Supp. 388 (E.D.N.Y. 1978), Judge Weinstein attempts to quantify the standards of proof in terms of percentages, placing the preponderance at "50K"% probable; a 70% probability under a clear and convincing standard; an 80% under clear unequivocal and convincing standard; and a 95% probability in proof beyond a reasonable doubt. When a standard of proof is on the defendant, as the probabilities increase there is a corresponding increase in the level of unreliability of the decision. Judge Weinstein, *id.* at 411, then goes on to state:

> If, as suggested earlier in discussing the standard of "clear, unequivocal and convincing evidence," the probability is about 80%, it means we would rather have four cases decided in error against the Government than more than one against the defendant.[37]

Applying this formula to the Oklahoma standard, Oklahoma would rather have four cases decided in error that the defendants were competent than one decided in error that the defendant was incompetent. In light of the fundamental right not to be tried while incompetent, this is clearly unacceptable. *Cf.* 4 W. Blackstone, *The Laws of England*, 358 (T. Wait & Co.) ("It is better that ten guilty persons escape than one innocent person suffer"). The higher the standard of proof placed on an individual to show his incompetence, the probability that he will be found incompetent decreases proportionately at a substantial risk to his fundamental right not to be tried while incompetent. It would be difficult to forget the moral force of our civilized law that absolutely condemns the trial of incompetent persons.

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[36] Justice Harlan goes on to state, ". . . The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *Id.* at 371.

[37] Oklahoma's definition of clear and convincing using the word unmistakable is probably equivalent to this standard using unequivocal. This Court has also interpreted the standard "clear, unequivocal and convincing" to be "substantially identical with that required in criminal cases—proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

3. *Important constitutional rights of individuals are violated by the Oklahoma standard.*

The high burden that Oklahoma places upon defendants creates an unacceptably high risk that incompetent individuals will be forced to trial. The common law never tolerated so high a risk. Nor did any American jurisdiction during the nineteenth century or the first three-fourths of the twentieth century. Today, neither federal law nor the law of forty-six of the fifty states will tolerate so high a risk. There are compelling reasons for this. The determination that a defendant is competent to proceed implicates a host of constitutional principles that merit protection commensurate with their fundamental status. As Justice Thomas noted for the Court in *Godinez*, 113 S.Ct. at 2686, the defendant who is determined competent to stand trial is an individual who subsequently will face many critical choices of constitutional dimension. He must decide whether to accept the guiding hand of counsel which the Constitution assures him, or to instead waive that right and choose self-representation. *Id.* at 2687. He must decide whether to plead guilty, and thereby waive his fundamental right to a trial. *Id.* at 2686. Additional choices are bound up in that question:

> He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination," *Boykin v. Alabama*, 395 U.S. 238, 243 . . . (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," *ibid.*; and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers," *ibid.*, by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses.

Godinez, 113 S.Ct. at 2686. By elevating the risk of an erroneous competency determination to unprecedented heights, Oklahoma necessarily has magnified the risk that each and every one of these constitutional choices will suffer.

Other constitutionally significant adverse consequences flow from the placement of so high a burden upon the defendant. Whenever Oklahoma brings to trial under the label of "competent" a defendant who would be adjudged incompetent and unfit for trial under the standards of the common law and the overwhelming majority of American jurisdictions, it places the reliability of the fact-finding process in that case at greater risk of error. It flirts with a significantly greater risk that relevant evidence will elude the factfinder's attention due to the defendant's incompetency and corresponding inabilities to fully participate in the defense and assist counsel. *See, e.g., Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986) (barely competent mentally ill capital defendant's inability to consult with his trial attorney prevented, in part, effective representation). It flirts, as well, with a significantly greater risk that the evidence which does make it before the factfinder will not be tested with the adversarial vigor contemplated by the Sixth and Fourteenth Amendments, again owing to the defendant's incompetency.

As the record in this case regrettably reveals, Oklahoma's severe standard also operates to bring to trial defendants whose appearance and demeanor can irrationally but nonetheless tangibly distort the search for truth, to the ultimate detriment of the presumption of innocence. The jury perceived Mr. Cooper during the trial as totally unconcerned with his fate. He sat curled up in a corner in his orange coveralls, chanting at times, sleeping at times, or just talking to himself. Toward the end of the trial, he ate his own feces. App. 44-49.

Early during voir dire, the dialogue between the court and a juror who insisted she could not be fair and im-

partial because Mr. Cooper looked "creepy" amply demonstrates the unacceptably high risk the trial of the incompetent has on the presumption of innocence. App. 44-45. Even jurors who do not express this verbally are surely thinking it. "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984).

Plainly, the outcome of a trial in which the defendant plays no part cannot be considered accurate, and an incompetent cannot conduct a defense either alone or through counsel.[38] It is a proud tradition of our constitutional system that

> [i]n a criminal case . . . the interests of a defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of erroneous judgment.

Addington, 441 U.S. at 423. Oklahoma's decision to place a burden upon the defendant to prove incompetency to stand trial by clear and convincing evidence simply cannot be reconciled with that tradition.

4. *Oklahoma's standard is inconsistent with the protective rationale behind the clear and convincing standard.*

This Court, in cases where the government is a party, has consistently restricted the application of high stand-

[38] "[T]he true reason of the Law I think to be this, a Person of *non sana memoria*, and a Lunatick during his Lunacy, is . . . disabled to make his just Defence, there may be Circumstances lying in his private Knowledg, which would prove his Innocency, of which he can have no advantage, because not known to the Persons who shall take upon them his Defence." *Trial of Charles Bateman*, 11 How. St. Tr. 467, 475 (1685); *Solesbee v. Balkcom*, 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting); *see* 4 W. Blackstone, *Commentaries*, *24 (1769).

ards of proof, such as the clear and convincing standard, to contexts where particularly important individual interests or rights are at stake. In the words of this Court,

> [t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.

Addington, 441 U.S. at 424; *see also Santosky*, 455 U.S. at 756.

Addington addressed the issue of involuntary civil commitment to a mental hospital, which, as this Court has long recognized, "constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425. The interest of the individual was to avoid indefinite confinement. *Id.* at 425-36. This Court rejected a preponderance standard because the risk of erroneous commitments would increase, and held that Due Process required the state to justify confinement by proof which is, at a minimum, clear and convincing. *Addington*, 441 U.S. at 427.

Likewise, compelling individual rights were at stake in *Santosky v. Kramer*, 455 U.S. 745 (1982). There, this Court held Due Process requires at a minimum that the state establish parental neglect by clear and convincing evidence before it can completely sever the rights of parents in their natural child. *Santosky*, 455 U.S. at 769-70. In evaluating the respective interests of the parties, the permanence of a decision to terminate was central to this holding. *Id.* at 761. The majority reasoned that the stricter standard would reduce erroneous terminations severely impacting on the individual's interest. *Id.* at 767.[39]

[39] Similarly, actions by the federal government to strip a naturalized immigrant of citizenship and to deport aliens implicate drastic consequences to a resident who "is compelled by our Government to forsake all the bonds formed here and go to a for-

This Court has also upheld the imposition of a clear and convincing requirement where the government sought to protect a compelling individual life or liberty interest. Here again, the purpose of the higher standard is to give greater protection to individuals. In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 502, 110 S.Ct. 2841 (1990), this Court considered the interest in refusing unwanted medical treatment against the relevant state gainsaying interest in the protection and preservation of human life. While an erroneous decision not to terminate life-support simply results in a maintenance of the status quo (with respect to the patient), an erroneous decision to terminate life-support is not susceptible to correction. 110 S.Ct. at 2854. Ultimately, the fundamental interest in the protection of human life, the irrevocability of an erroneous decision for death, and the nonadversary fact-finding process justified the clear and convincing standard against the petitioner's due process claims.[40] Thus, the clear and convincing requirement served to protect the individual's interests by ensuring that an irrevocable erroneous decision was not made.[41]

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eign land where he often has no contemporary identification." *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285 (1966). In these contexts the government must prove facts supporting the denaturalization or deportation by evidence which is "clear and convincing" or "clear, unequivocal, and convincing." *See id.* at 286 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125-26 (1943).

[40] In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), this Court approved a clear and convincing standard placed on a minor seeking an abortion without parental consent. Again, the finality of an abortion decision and the vulnerability of the minor justify the state application of this standard, especially where the minor was represented by counsel at the ex parte bypass hearing.

[41] This Court has held the clear and convincing standard to apply to citizens under criminal sanctions in only one, vastly different circumstance—when a condemned prisoner alleges, in federal collateral review proceedings, that new evidence proves his death sentence amounts to a miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514 (1992). Unlike the pretrial competency determination, federal collateral review implicates weighty comity and finality interests. The Court has since made clear that even in this setting, the clear and convincing standard is inappropriate where actual innocence is at stake. *Schlup v. Delo*, —— U.S. ——, 115 S.Ct. 851, 865 (1995).

Far from ensuring adequate protection for the fundamental right not to be tried while incompetent, the Oklahoma standard exposes it to great risk and assures less reliable determinations. From these holdings, one common theme is obvious: the purpose of requiring a standard of clear and convincing evidence is to ensure a heightened level of protection for certain vulnerable classes of individuals and to provide accuracy of decisions concerning these individuals. They cannot be faithfully read to support the imposition of an unreasonable burden on vulnerable individuals who have a fundamental interest not to be tried while incompetent.

II. THE FUNDAMENTAL RIGHT NOT TO BE TRIED WHILE INCOMPETENT REQUIRES HEIGHTENED RELIABILITY WHERE THE STATE SEEKS TO TAKE A PERSON'S LIFE.

Petitioner has demonstrated in the foregoing proposition that his fundamental right not to be tried while incompetent is violated by requiring him to go to trial even though the greater weight of the evidence shows he is incompetent. The risk to this right is even more acute where one is on trial for his life because the execution of a sentence of death is not "susceptible of correction." *Cruzan*, 110 S.Ct. at 2854.

Well before recognition of the fact that death is qualitatively different, this Court applied greater procedural safeguards under the due process clause for death cases as opposed to non-death cases.[42] "It is the universal ex-

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[42] *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) recognized a constitutional right to counsel in capital cases only. *See also*

perience in the administration of criminal justice that those charged with capital offenses are granted special considerations." *Griffin v. Illinois,* 351 U.S. 12, 28 (1956) (Burton and Minton, JJ., joined by Reed and Harlan, JJ., dissenting).[43]

Heightened due process concerns in capital cases have been expressed in numerous other decisions in this Court's jurisprudence over the past 30 years.[44] While the trial of a person who by the greater weight of the evidence is incompetent is fundamentally unfair in and of itself, placing a person on trial for his life who by the greater weight of the evidence is incompetent implicates the defendant's fundamental constitutional right to be free from cruel and unusual punishments.

Capital sentencers are required to make a reasoned moral judgment as to an individual's life. *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (*quoting California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). An individual's capacity to meaningfully participate in, and react and respond to proceedings and demonstrate remorse or contrition is fundamentally impaired if he is incompetent. Only recently the Court recognized that

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Diaz v. United States, 223 U.S. 442 (1912) (right to presence at trial so important that defendant cannot waive).

[43] This practice has continued after *Gregg v. Georgia,* 428 U.S. 153 (1976). "In capital cases, the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases." *Ake v. Oklahoma,* 470 U.S. 68, 86 (1985) (Burger, C.J., concurring in judgment).

[44] Due process entitles the defendant to inform the capital sentencing jury by either argument or instruction that he is parole ineligible. *Simmons v. South Carolina,* 512 U.S. ——, 114 S.Ct. 2187, 2201 (1994) (Rehnquist, C.J.; O'Connor and Kennedy, JJ., concurring in judgment); *id.* at 2199 (Ginsburg, J., concurring). *See also Green v. Georgia,* 442 U.S. 95, 97 (1979) (per curiam); *Presnell v. Georgia,* 439 U.S. 14, 16 (1978); *Beck v. Alabama,* 447 U.S. 625 (1980).

> prejudice can be acute during the sentencing phase of the proceeding, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps be determinative of whether the offender lives or dies.

Riggins v. Nevada, 112 U.S. at 1819-20 (1992) (Kennedy, J., concurring in judgment).

As any competent trial lawyer knows, demeanor and trial conduct play an important part in a jury's decision in the trial of a capital case. *See* Geimer and Amsterdam, *Why Jurors Vote Life or Death; Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1, 51-53 (1987-1988).[45] A mentally incompetent individual's demeanor may be such as to scare the jurors, or indicate apathy toward his situation or lack of remorse toward the victim's family or society. At times during the trial, Mr. Cooper sat in the corner in a fetal position or asleep. At other times he was talking to himself or chanting. It is not hard to imagine the jury's perception of Cooper in his orange coveralls, hair going in every direction, seemingly oblivious to the trial around him. One would naturally

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[45] Geimer surveyed numerous jurors. "About one-third of the jurors interviewed said demeanor was a contributing factor in the sentence recommendation, and one juror attributed the verdict entirely to the defendant's demeanor." *Id.* at 51. One juror noted, "Nobody saw a heartbeat of regret. He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored." *Id.* at 52.

The juror who attached the most significance to a defendant's demeanor in this study described his demeanor at trial as callous and indifferent. In another capital case investigated by this study, jurors influenced by the defendant's demeanor described him as 'indifferent to the proceedings' 'passive' 'emotionless' 'no remorse—no anything.' *Id.*

expect some jurors to fear such a defendant and thus vote for death in spite of numerous factors which called for a less severe verdict. The sentencer's decision in a capital case cannot reflect "a reasoned moral response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *Penry*, 492 U.S. at 319, when an incompetent person's inappropriate demeanor competes with the sentencer's consideration of legitimate sentencing factors. This trial result can hardly be considered reliable.[48]

Aside from the fundamental concerns discussed above, a person who is more likely than not incompetent may not understand or be able to relate the concept of his involvement or involvement of codefendants or general culpability, an important aspect in determining sentencing. The "fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the 'circumstances of the particular offense' in imposing sentence." *Enmund v. Florida*, 458 U.S. 782, 830 (1982) (O'Connor, J., dissenting) (*quoting Woodson v. North Carolina*, 429 U.S. 280, 304 (1976)).

Recognition and use of mitigating evidence plays a crucial part in the factfinder's determination as to the appropriate penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978). The defendant's ability to assist counsel in finding and presenting mitigation is lessened if not entirely denied when he lacks competence. *See, e.g., Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982) (scope of counsel's duty to investigate mitigation witnesses limited by defendant's refusal to identify witnesses). The best, and sometimes only, source of mitigating factors is often the defendant himself. A defendant can provide information known solely to himself only if he is able to understand the concept of mitigation and assist counsel. An individual who more probably than not is incompetent cannot give necessary information to counsel to use to convince the jury to spare his life.

[48] "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted).

Cooperation with and trust in counsel are also necessary not only in obtaining and offering mitigating evidence, but essential to decisions to testify, plea bargain, waive jury at penalty stage, and put on mitigating evidence. *Wallace v. State*, 893 P.2d 504 (Okla. Crim. App. 1995); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990) (one can choose to forego the presentation of mitigating evidence even over the contrary advice of counsel and warning of the court). One who is more likely than not incompetent cannot make the informed choices necessary to adequately defend himself at a capital murder trial.

The trial of an individual who is more probably than not incompetent encompasses a litany of constitutional issues at both the guilt and punishment stages of a capital trial as demonstrated herein. This standard diminishes the reliability of the sentencing determination, creates a clearly avoidable risk the death penalty might be imposed in spite of factors which call for a less severe sentence, and creates a spectacle of the trial wherein the person is forced to trial even though he is more likely than not incompetent. Such a spectacle, condemned since common law, totally violates the fundamental right not to be tried while incompetent.

CONCLUSION

Oklahoma's use of the clear and convincing standard to determine competency to stand trial in a capital case violates the Eighth and Fourteenth Amendments. For the reasons stated in the foregoing brief, Petitioner respectfully requests this Court reverse and remand his case for a new trial.

Respectfully submitted,

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